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Recommended Citation

Brief of Respondent, *State v. Schrieber*, No. 7737 (Utah Supreme Court, 1951).
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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

AUGUST SCHREIBER,

Defendant and Appellant.

Case No. 7737

BRIEF OF RESPONDENT

FILED

DEC 18 1951

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TABLE OF CONTENTS

	Page
Statement of Case	3
Statement of Points	5
Argument	5
Point I	
A COURT HAS INHERENT JURISDICTION TO VACATE AN ORDER MADE BY IT WHEN THAT ORDER IS PROCURED THROUGH FRAUD, DECEIT OR MISREPRESENTATIONS. THE ORDER SETTING ASIDE DEFENDANT'S CONVICTION AND DISMISSING THE ACTION WAS BASED UPON MISREPRESENTATIONS MADE TO THE TRIAL COURT, AND THAT COURT THEREFORE ACTED PROPERLY IN VACATING ITS ORDER	5
Conclusion	15

Statutes

85-9-81 to 84, Utah Code Annotated 1943	13
105-36-17, Utah Code Annotated 1943	4, 13
Chapter 24, Laws of Utah 1943	4
Article VII, Section 12, Utah Constitution	4

	Page
Texts	
31 Am. Jur., p. 282, Sec. 738, "Judgments".....	6

Cases	
In re Flint, 25 Utah 338, 71 P. 631	14
Lyons v. Goldstein, 47 N.E. 2d 425, 290 N. Y. 19.....	6, 15
People ex rel. Walsh on Behalf of Katz v. Ashworth, Warden, 56 N.Y.S. 2d 791	6

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

AUGUST SCHREIBER,

Defendant and Appellant.

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BRIEF OF RESPONDENT

STATEMENT OF CASE

Except to the extent that the record will support the State's assertion that the defendant procured the order of the trial court, dated October 20, 1949, through misrepresentations sufficient to warrant setting aside of that order, defendant's statement of the facts of the case is complete and correct, and we accept it.

The State's position is this: any court has inherent power to set aside an order it has made when that order is procured

through fraud, deceit, or misrepresentation. The order of the trial court made October 20, 1949, setting aside the conviction of defendant and dismissing the action was entered upon certain representations being made to the trial court by defendant as to the necessity of that order. The record itself, regardless of what might be considered extra-judicial reports coming to the attention of the trial judge, will support the fact that these representations were false when made, and therefore the court had jurisdiction to revoke the order made upon such misrepresentations.

A good argument may be made that the amendment to section 105-36-17, Utah Code Annotated 1943, by Chapter 24, Laws of Utah 1943, does violence to the pardoning power as set forth in Article VII, Section 12, Utah Constitution. Under the 1943 amendment, after a defendant has been placed upon probation, the district court "may if it be compatible with the public interest either upon motion of the district attorney or of its own motion terminate the sentence or *set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant.*" (Emphasis added.) Action taken under the emphasized portion of the statute quoted would appear to be an exercise of the pardoning power, and we doubt that such action may be allowed a trial court under the constitutional provision for the Board of Pardons. Indeed, this is the theory upon which the district attorney sought to have set aside the order of October 20, 1949, setting aside the conviction of the defendant, dismissing the action, and discharging him (R. 57-58). The trial court did not enter its order of June 9, 1951, vacating the order of October 20, 1949, on this theory (R. 107-108), but rather, based his

action upon the proposition that the earlier order was obtained through misrepresentation of the intent of the defendant and the facts and circumstances surrounding his case. We believe that the order of the trial court made June 9, 1951, vacating its order of October 20, 1949, setting aside defendant's conviction and dismissing the action, was properly based upon the fact that the latter order was procured through misrepresentations made to the court, and this court need not therefore consider the constitutional question. We shall, therefore, present this one point only.

STATEMENT OF POINTS

I.

A COURT HAS INHERENT JURISDICTION TO VACATE AN ORDER MADE BY IT WHEN THAT ORDER IS PROCURED THROUGH FRAUD, DECEIT OR MISREPRESENTATIONS. THE ORDER SETTING ASIDE DEFENDANT'S CONVICTION AND DISMISSING THE ACTION WAS BASED UPON MISREPRESENTATIONS MADE TO THE TRIAL COURT, WHICH ARE SHOWN ON THE RECORD, AND THAT COURT THEREFORE ACTED PROPERLY IN VACATING ITS ORDER.

ARGUMENT

I.

A COURT HAS INHERENT JURISDICTION TO VACATE AN ORDER MADE BY IT WHEN THAT ORDER

IS PROCURED THROUGH FRAUD, DECEIT OR MISREPRESENTATIONS. THE ORDER SETTING ASIDE DEFENDANT'S CONVICTION AND DISMISSING THE ACTION WAS BASED UPON MISREPRESENTATIONS MADE TO THE TRIAL COURT, WHICH ARE SHOWN ON THE RECORD, AND THAT COURT THEREFORE ACTED PROPERLY IN VACATING ITS ORDER.

The general rule in civil cases is that a judgment procured through fraud, deceit, or misrepresentations may be vacated by the court. 31 Am. Jur. p. 282, Sec. 738, "Judgments." The same rule applies in criminal matters. In the case of *Lyons v. Goldstein*, 47 N. E. 2d 425, 290 N. Y. 19, the court stated:

The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted. (Cases cited). No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them.

See also *People ex rel. Walsh on Behalf of Katz v. Ashworth, Warden*, 56 N. Y. S. 2d 791. Taking this to be the applicable rule, we shall review the records of the hearings held October 20, 1949, and June 9, 1951, to show wherein the order of October 20, 1949, setting aside the conviction of defendant, dismissing the action, and discharging defendant from the supervision of the State Parole Department was obtained by

misrepresenting to the trial court the facts and circumstances surrounding defendant's application for the order of October 20, 1949, setting aside his conviction and dismissing the action against him.

The testimony of Dr. Henning on the two hearings is illustrative of this. On the hearing of October 20, 1949, after testifying to the physical condition of defendant, that witness testified as follows (R. Ex. A, p. 2-3):

Q. And what is the remedy for that?

A. Well, of course the immediate remedy is usually sedatives and rest but the permanent remedy is also a great deal of rest and lower altitudes and more regular atmosphere; warmer and not too changeable.

Q. And would you say that Dr. Schreiber's health would increase definitely if he was in a lower altitude and more constant warm climate?

A. I would say yes.

* * * *

THE COURT: Doctor, do you recommend that Dr. Schrieber be transferred or be permitted to go to a lower climate?

A. At least for quite some time.

THE COURT: And do you think his remaining in Utah would be detrimental to his health?

A. At least in the wintertime would be.

There is a sense of positiveness and urgency here. The recitals introductory to the order signed the same day also indicate

this sense of urgency for the sake of the health of defendant and his son (R. 63-64). Yet defendant did not leave for Florida until well into the month of December, 1949, and then only when the trial judge had indicated he was contemplating reconsidering the order of October 20, 1949 (R. 108).

On the hearing held June 9, 1951, at which Dr. Henning's testimony was subject to cross-examination—it was not on October 20, 1949, (R. 94-95)—he was not nearly so positive as to the necessity for defendant living in a lower altitude or more stable climate (R. 101):

CROSS EXAMINATION

By Mr. Roberts:

Q. At the time you examined him, I think it was in September, 1949, you were of the opinion that what he should do was move to a lower climate—we can call it a lower climate?

A. Well, it usually helps people to be in a little lower altitude, who are extremely upset emotionally.

Q. And it was your opinion then if he would go to a lower altitude that his physical condition would improve?

A. And I thought it would help quite a bit to get away from here, and be in a lower altitude.

Q. At that time you thought the climate and altitude he would find in Florida would be extremely beneficial to his health?

A. At that time that is what I thought.

Q. Is there anything that would change your mind at the present time?

A. He didn't seem to get any better. I was in constant communication with him, through his letters, and he informed me he wasn't getting any better, and, in fact, asked me several times if I couldn't come down.

At the hearing October 20, 1949, the defendant testified that he intended to leave the state of Utah permanently and take up residence in Florida. We quote from the record, Exhibit A, page 4:

Q. Now, Dr. Schrieber, when you are able to do so, it is your plan to leave the State of Utah permanently and go where?

A. To the state of Florida.

Q. And you would take your son with you?

A. Yes.

This defendant conveniently forgot at the hearing held June 9, 1951. We quote from the record, p. 78-79:

Q. And you recall the proceedings that were had in court the 20th day of October, 1949, at the time when Mr. Maw represented you in this transaction, with reference to having the order setting aside the conviction obtained in this case?

A. Yes.

Q. And you recall at that time, do you not, that you represented to the court it was your intention permanently to leave the state of Utah?

A. I don't remember what it was.

Q. Well, wasn't it a fact at that time you said it was your intention to permanently leave the state of Utah?

A. It was my intention to leave Utah, yes.

Q. Permanently leave?

A. Permanently wasn't definite. I wasn't told to go.

Q. Do you recall the matter of your permanently leaving the state was discussed during those proceedings?

A. I don't recall exactly any more.

Q. Didn't your counsel, Mr. Maw, represent to the court you would leave the state and you would stay away permanently from the state because of your health, and practice your profession in Florida?

A. He said I would leave the state for my health, but I don't recall I would leave permanently.

The record further shows that the trial judge, in granting the order of October 20, 1949, setting aside the conviction of defendant and dismissing the charge against him, took this extraordinary action upon a belief, given him by representations made by defendant's counsel, Mr. Maw, that defendant was going to a lucrative position which his health would permit him to occupy, and which would enable him to become established in his profession in Florida. Mr. Maw testified to this on direct examination (R. 89), and upon examination by the trial court (R. 93-94). Yet defendant knew nothing of this when he was examined thereon by the court on June 9, 1951. We quote from the record, page 85-86:

EXAMINATION BY THE COURT

* * * *

Q. Now, at the time you left here you had a job in a hospital in Florida that was going to pay you about three hundred a month for about two or three hours' work a day?

A. No, I didn't.

Q. Didn't you have such a job as that?

A. No, I was very ill at that time. I was going to open an office there.

Q. Would it surprise you if I told you Dr. Maw told me you had a job in Florida, that would pay you practically three hundred a month for two or three hours' work a day—that would surprise you?

A. That would surprise me.

Q. It would if I told you that?

A. Yes, it would.

when examined further along this line by his counsel, Mr. Maw, defendant's memory simply failed him (R. 86):

Q. Mr. Schreiber, don't you remember telling me in Miami, Florida, there was a possibility of your having a job in a hospital down there, or some place, where you would have a basic income when you came, and you discussed this matter with me?

A. I just don't recall. I said I could get it if I will go down there. I have a license there, I am sure I could get a position down there.

Q. That is, a position where you could work part time, and carry on your profession?

A. I don't recall that, exactly.

Q. Do you remember discussing anything like that with me, at all?

A. I can't recall that, that I mentioned I would get a job down there, get a job in a hospital—I don't just recall it—I just don't know.

When defendant was passing through Utah in November, 1950, and wished to determine his status within this state, he did not, as one would who is presumably acting in good faith under the circumstances, consult the judge whose order he wanted interpreted. Rather he went to another judge who had had nothing to do with his case (R. 81, 88). He apparently gave the judge who had ordered the setting aside of his conviction a wide berth. This, as noted by Judge Van Cott, does not impress one that the defendant was acting in good faith (R. 110).

It should be further noted that defendant's health, for some strange reason, began improving for the first time *after* he returned to Utah (R. 83, 99, 100-101). Further, defendant made *no* effort to establish a practice either in Florida or California (R. 99).

The entire record dealing with the order of October 20, 1949, and the subsequent proceedings whereby that order was revoked show that the trial judge was misled in granting that order. That order is extraordinary in that it sets aside a conviction upon a verdict, dismisses the action, and discharges the defendant. It has the effect of wiping the slate clean, leaving the defendant with a clear record. The trial court could as easily have continued defendant on probation under the supervision of the Adult Probation and Parole Department, and

allowed defendant to seek out-of-state supervision under the Uniform Out-of-State Supervision Act, Sections 85-9-81 to 85-9-84, Utah Code Annotated 1943, and the compact between this state and Florida in effect at that time. Rather, it chose to act under the power granted it by the amendment made to section 105-36-17, Utah Code Annotated 1943, by Chapter 24, Laws of Utah 1943, permitting trial courts to "set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant." One can only assume that the trial court acted thus on a belief, engendered by defendant, that it was his intent to move to Florida permanently to rehabilitate himself and the health of him and his son, and that such a move was urgent and indispensable. Yet within eight months after leaving the state, the defendant was returned, located in a home, and preparing to resume a professional practice, his health improving only since that return! We believe that the record, apart from any extra-judicial utterances and statements that might have been considered by the trial judge, clearly indicates that the defendant never, at any time, actually intended to go to Florida or California or anywhere except for a long enough period for the matter to "blow over" so that he could re-establish a practice in Salt Lake City with the clear record given him by the court based upon his misrepresentations.

Defendant urges in his brief that if the order of October 20, 1949, was conditioned upon his remaining out of the state permanently and in any event, it would be a condition of banishment, and therefore void. We have no quarrel with this. That is, we agree with defendant's statement of the law that an order of banishment is void as against public policy.

However, to assume that the trial judge revoked the order of October 20, 1949, setting aside the conviction of defendant and dismissing the action against him, simply because he returned to this state, is to misconstrue the theory upon which the trial judge was acting in revoking that order. That judge revoked his earlier order because it was shown to him that that order was procured in bad faith and upon misrepresentations as to the facts and intent of defendant at the time the order issued. Defendant's early return to the state was merely a circumstance which, along with others, indicated that he had been thus acting in bad faith. Such was the consideration of the trial judge (R. 111).

Defendant has cited the case of *In re Flint*, 25 Utah 338, 71 P. 531, for authority that the trial court, by its order setting aside the conviction of defendant, dismissing the action against him, and discharging him, lost jurisdiction of the case and could not thereafter reconsider that order. We submit that that case is not in point here. In the *Flint* case the trial court, after the defendant had been convicted, but before he had been sentenced, ordered the sentence indefinitely suspended, and released defendant upon his own recognizance. The trial court subsequently had defendant arrested, brought before him, sentenced him, and defendant was committed. Upon habeas corpus, this court simply held that the trial court, on these facts, lost jurisdiction, and the sentence therefore was void. There is no indication that the order of the trial court in the *Flint* case was procured by misrepresentations made to the trial court, nor is there any indication whatsoever that this proposition of law was considered. Here, defendant had been sentenced, and was in the process of serving the sentence

in the manner prescribed by the court. Through misrepresentation of his intent and the facts and circumstances surrounding his case, he procured an order setting aside his conviction and discharging him. Because of these misrepresentations, the trial court did not lose jurisdiction of the case. "The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted." *Lyons v. Goldstein, supra*.

CONCLUSION

The defendant in this appeal urges that the order of October 20, 1949, setting aside the conviction of the defendant, dismissing the action against the defendant, and discharging him is based upon a valid act of the legislature, was final and unconditional, divesting the court of jurisdiction, and that the trial court was without power to revoke that order. He further urges that the order of June 9, 1951, setting aside the order of October 20, 1949, is void and beyond the power of the trial court for the reason that the court considered extrajudicial utterances and statements as a basis therefor. He also claims that the condition upon which the order of October 20, 1949, was granted is void because it in effect constitutes banishment.

The theory of the State is that the order of October 20, 1949, setting aside the conviction of the defendant, dismissing the action against him, and discharging him was procured by the defendant through misrepresentations as to his intent provided that order be granted, and as to the facts and circum-

stances surrounding his case at that time. These misrepresentations may not have constituted fraud in the legal sense, but they were sufficient to show that the defendant was not dealing honestly with the trial court (R. 111).

We respectfully submit that the record shows this absence of good faith on the part of the defendant in procuring the order of the court of October 20, 1949. We further respectfully submit that the court has inherent jurisdiction to vacate such an order upon those facts and that the trial court in this instance acted properly and within its jurisdiction. This being so, this court need not consider other questions raised, but should affirm the order of the trial court.

Respectfully submitted,

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